

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

JOHN GAMLAM,

Appellant,

v.

SELECT PORTFOLIO SERVICING,
INC.,

Respondent.

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No. 61366-9-I

UNPUBLISHED OPINION

FILED: June 8, 2009

Schindler, C.J. — Select Portfolio Servicing, Inc. (SPS) accepted John Gamlam's bid to purchase real property in Snohomish County at a nonjudicial foreclosure sale. The bankruptcy court later voided the sale and ordered SPS to immediately return the money to Gamlam. Gamlam sued SPS for the amount owed with interest and for breach of contract. SPS concedes Gamlam is entitled to a refund of the purchase price with 12 percent interest. However, SPS asserts that Gamlam is not entitled to damages or interest before the bankruptcy court order voiding the sale because it had the authority to proceed with the nonjudicial foreclosure. Substantial evidence supports the trial court's finding that SPS willfully violated the bankruptcy stay and did not have the authority to proceed with the nonjudicial foreclosure sale of

the debtor's property. Consequently, the court did not err in concluding that Gamlam was entitled to interest from the date of the sale until SPS paid the principal amount owed. Under the plain language of the bankruptcy code, 11 U.S.C. § 362(k)(1), the court also did not err in awarding Gamlam damages based on the willful violation of the bankruptcy stay. We affirm.

In 1994, John and Kristan Sanchez (collectively Sanchez) borrowed \$288,000 from Washington Mutual to buy a house in Snohomish County. The loan was secured by a deed of trust on the property. As the successor in interest to Washington Mutual, DLJ Mortgage Capital, Inc. holds the note secured by the deed of trust. Select Portfolio Servicing, Inc. (SPS) is a mortgage loan servicer for DLJ Mortgage.

Sanchez defaulted on the loan payments. In 2005, SPS commenced a nonjudicial foreclosure proceeding and scheduled the sale of the Sanchez property for December 30, 2005. On December 29, Sanchez filed for chapter 13 bankruptcy. SPS filed a motion to dismiss the chapter 13 bankruptcy or, in the alternative, for relief from the automatic bankruptcy stay.

At the hearing on March 8, 2006, the bankruptcy court judge ordered an accounting to determine the amount owed on the house and scheduled an evidentiary hearing for May 15. The docket minutes also state, "Relief from Stay granted effective 6/1/06." The evidentiary hearing did not take place as scheduled on May 15. On June 27, SPS proceeded with the nonjudicial foreclosure sale of the property.

John Gamlam is a real estate broker who buys properties to restore and resell

at nonjudicial foreclosure sales. On August 22, 2006, SPS accepted Gamlam's bid of \$563,000 to purchase the Sanchez property. Gamlam paid SPS \$563,000. In exchange, SPS executed the deed to the property to Gamlam. Gamlam recorded the deed on September 5.

When Gamlam contacted Sanchez to inform him that he owned the house, Sanchez told Gamlam that he was in chapter 13 bankruptcy. Thereafter, Sanchez filed a motion in the bankruptcy court for injunctive relief and to rescind the sale of the property. On September 21, the bankruptcy court issued an order voiding the sale of the property and ordering SPS to "immediately refund Gamlam the full and complete" amount paid. The court order states:

1. That the foreclosure sale of August 25, 2006 is void.
2. That Creditor, Select Portfolio Servicing, Inc. and its counsel, Charles Nunley, and its agents, T.D. Escrow, is hereby instructed to immediately take the steps necessary to immediately refund the full and complete purchase funds paid by the purported third party purchaser to said purported third party purchaser.

In December, Gamlam sued SPS for "Breach of Contract and Monies Due."¹

Gamlam alleged that SPS did not refund the amount paid for the property and breached its contract by not conveying title to the property. Gamlam sought a judgment for the amount owed with 12 percent interest and damages for the difference between the amount paid and the fair market value, as well as consequential damages

¹ Gamlam also sued T.D. Escrow Services, Inc. T.D. Escrow held the nonjudicial foreclosure sale on behalf of SPS. T.D. Escrow and Gamlam entered into a stipulated order of dismissal of the lawsuit against T.D. Escrow.

resulting from the breach of contract.

On January 18, 2007, SPS sent Gamlam a letter offering to return the purchase price. The letter states:

Select Portfolio Servicing, Inc. has the balance of the proceeds from the sale and is prepared to transmit those funds either to you or to your client directly via wire transfer. They require wire instructions to do so. Please provide me with appropriate wire instruction so that the funds can be transferred.

In response, Gamlam told SPS that he was not willing to provide his bank information and wanted to be paid by check for the amount owed with interest.

In a letter dated February 5, Gamlam's attorney reiterated that it appeared that SPS was seeking to avoid paying interest by only offering to return the purchase price. Gamlam's attorney suggested that SPS make a reasonable offer, but noted, "If your offer is going to simply be to refund the bid amount" without the interest due, "[i]t will be rejected again." The letter also states, "The absolute low range of Mr. Gamlam's damages is the consideration he paid to your clients, plus 12% representing the time-value of that money."

In a letter dated February 13, the attorney for SPS states, "[M]y clients are ready, willing, and able to refund to Mr. Gamlam 100% of the sale proceeds and wish to do so immediately If you continue to refuse the return of the funds, I will have no choice but to pay them into the registry of the court." It is undisputed that SPS did not pay the amount owed into the court registry.

On August 7, 2007, Gamlam filed a motion for partial summary judgment.

Gamlam asked the court to order SPS to refund the \$563,000 he paid for the property with 12 percent interest from the date of the sale. SPS filed a response and cross motion for summary judgment. In response, SPS argued that Gamlam had a duty to accept the offer to return the purchase price and failed to mitigate his damages by refusing to do so. In the cross motion, SPS argued that Gamlam was not entitled to interest or damages because SPS had the authority to proceed with the foreclosure sale.

The trial court granted Gamlam's motion for partial summary judgment. The court ordered SPS to return the purchase price plus 12 percent interest from the date SPS accepted Gamlam's bid on August 25, 2006. On October 26, Gamlam received a check from SPS for the principal but without interest.

The bench trial took place on December 21. The issue at trial was whether SPS was liable to Gamlam for damages and interest from the date SPS accepted the bid until SPS paid the amount owed on October 26. Gamlam argued that because SPS sold him the property in violation of the bankruptcy stay, he was entitled to interest from the date of the sale and damages for breach of contract.

Relying on the bankruptcy court minute entry that states "Relief from Stay granted effective 6/1/06," SPS argued that it was authorized to proceed with the foreclosure sale and was not liable for damages. SPS also argued that Gamlam was not entitled to interest until the bankruptcy court entered the order voiding the sale on September 21. In the alternative, SPS claimed that Gamlam was not entitled to

interest after SPS offered to pay the principal amount owed in January 2007, and that because its only obligation was to deliver the deed to the property to the trustee, “the intervention of the bankruptcy court made performance impossible.”

At the conclusion of the trial, the court found that SPS willfully violated the bankruptcy stay by proceeding with the foreclosure sale. The court concluded that because the bankruptcy stay was conditional and the terms were not met, SPS willfully violated the stay and was not authorized to proceed with the nonjudicial foreclosure sale.

The Court finds that in the instant case SPS did willfully violate the stay of the bankruptcy court. SPS was fully aware of the Sanchezes’ bankruptcy filing. SPS was fully aware of the stay issued by the bankruptcy court. It appeared in court to argue against the stay on June 1, 2006, and did not prevail. It only received a conditional stay, and the conditions ultimately were not met. This was clearly pointed out to them on September 21, 2005 by Judge Glover.

The court ruled that Gamlam was entitled to a refund of the amount paid with 12 percent interest from the date of the sale until the principal was paid in October 2007. The court also ruled that Gamlam was entitled to damages of \$137,000 based on the difference between the amount Gamlam paid and the fair market value of the property. However, the court declined to award an additional \$500,000 that Gamlam sought as lost opportunity damages.

Implementing the damage rule of 11 USC §362(k), the Court finds that the actual damages suffered by Mr. Gamlam are the following: (1) The return of the purchase price of \$563,000; (2) The payment of interest at 12% per annum from August 25, 2006 until the principal was ultimately paid in 2007; and (3) Payment of benefit of

the bargain damages which are measured by the following analysis: The fair market value of the property purchased on August 25, 2006 by Mr. Gamlam was \$700,000. He bought it in good faith at the foreclosure sale at a price of \$563,000. He's entitled to the benefit of that bargain in the amount of \$137,000.

As to the claim by Mr. Gamlam that he has also suffered damages for "lost opportunity," amounting to something over \$500,000 which allegedly accrued during the 14 months that he did not have the use of the money that he paid to SPS, the Court declines to award Mr. Gamlam's claim for lost opportunity damages. This measure of damages is somewhat speculative, and does not rise to the level of damages proved by a preponderance of the evidence.

The court entered judgment in favor of Gamlam for the amount owed of \$563,000 with 12 percent interest from the date of the nonjudicial foreclosure sale until SPS paid the principal in October 2007 and \$137,000 in damages. The court also awarded reasonable attorney fees and costs to Gamlam. SPS appeals.

SPS admits that Gamlam is entitled to a refund of the amount he paid for the property. SPS also does not dispute that Gamlam is entitled to 12 percent interest. But SPS claims that Gamlam is only entitled to interest from the date of the bankruptcy order voiding the sale on September 21, 2006 until the date SPS made an unconditional tender of the sale proceeds on January 18, 2007. SPS contends the court erred in ruling that Gamlam was entitled to interest before the bankruptcy court order voiding the sale and that the trial court erred in ruling that Gamlam was entitled to damages under 11 U.S.C. § 362(k)(1).

The standard of review of an order on summary judgment is de novo. Castro v.

Stanwood Sch. Dist. No. 401, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004). Summary judgment is properly granted if there are no material issues of fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

We review the trial court's decision following a bench trial to determine whether the findings are supported by substantial evidence and whether those findings support the conclusions of law. Dorsey v. King County, 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988). Substantial evidence is a quantum of evidence sufficient to persuade a rational and fair minded person that the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). In determining the sufficiency of evidence, we need only consider evidence favorable to the prevailing party. Bland v. Mentor, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). Unchallenged findings of fact are also verities on appeal. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); RAP 10.3(g). We review questions of law de novo. Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003).

Assuming, without deciding, that there were material issues of fact as to whether Gamlam was entitled to interest before the date of the bankruptcy order voiding the sale, that issue was clearly raised at trial. The court found that Gamlam was entitled to interest and damages before the bankruptcy order voiding the sale. Because SPS does not challenge any of the court's findings of fact, the findings are verities on appeal. In re Estate of Jones, 152 Wn.2d at 8. In any event, substantial evidence supports the trial court's finding that because SPS was not authorized to proceed with

the nonjudicial foreclosure sale and willfully violated the bankruptcy stay, Gamlam was entitled to interest and damages from the date of the sale.

At trial, SPS relied on the bankruptcy court minute entry “Relief from Stay granted effective 6/1/06,” to argue that it was not liable for interest or damages because it was entitled to proceed with the nonjudicial foreclosure sale. The testimony did not support SPS’s argument. Sanchez’s attorney testified, “Judge Glover ruled that the motion to dismiss was denied, that the forensic accountant should be appointed, and that SPS was granted a conditional relief of stay which would occur after the evidentiary hearing, after the forensic accountant had completed his report.” Sanchez’s attorney explained that “SPS was granted a relief of stay after June 3 if after receiving the accountant’s report Mr. and Ms. Sanchez did not then bring current the mortgage based on the accountant’s report.”²

Sanchez’s attorney also testified that at the hearing on Sanchez’s motion to void the sale, the bankruptcy judge told SPS:

[T]hat the previous order that had been issued which assigned the forensic accountant and set the evidentiary hearing was a prerequisite to the avoidance of the bankruptcy stay, and so since we had not yet had the evidentiary hearing that condition had not yet been met, and so, therefore, the sale was void.

The trial court concluded that Gamlam was entitled to interest from the date SPS accepted the bid. As a matter of law, prejudgment interest is properly awarded when the amount claimed is “liquidated,” or “readily and precisely determinable

² The accounting did not occur until winter of 2006.

without reliance on opinion or discretion.” Buckner, Inc. v. Berkey Irr. Supply, 89 Wn. App. 906, 917, 951 P.2d 338 (1998). “The award of prejudgment interest is based on the public policy that a person retaining money belonging to another should pay interest on that sum to compensate for the loss of the money’s ‘use value.’” Buckner, 89 Wn. App. at 916-917 (quoting Hansen v. Rothaus, 107 Wn.2d 468, 473, 730 P.2d 662 (1986)); Colonial Imports v. Carlton Northwest, Inc., 83 Wn. App. 229, 242, 921 P.2d 575 (1996).

SPS also asserts that because it unconditionally offered to tender the sale proceeds to Gamlam in January 2007, the trial court erred in awarding interest after that date. If a defendant tenders the amount due and the plaintiff refuses to accept it, interest may be tolled.³ Forbes v. American Bldg. Maintenance Co. West, 148 Wn. App. 273, 299, 198 P.3d 1042 (2009). The defendant may also toll the interest by “placing the amount due in the registry of the court.” Forbes, 148 Wn. App. at 299. Here, although SPS told Gamlam that it was willing to pay the principal amount owed in January 2007, SPS did not send a check to Gamlam for the principal owed until October 26, 2007.

SPS relies on the language in the letter from Gamlam’s attorney stating that Gamlam would reject a refund for the amount of the principal, to argue that it offered to tender the amount due and Gamlam rejected the offer. The language SPS relies on is

³ Black’s Law Dictionary defines “tender” as “[a] valid and sufficient offer of performance; specif., an unconditional offer of money or performance to satisfy a debt or obligation” Black’s Law Dictionary 1507 (8th ed. 1999).

taken out of context and does not support SPS's argument. The letter was clearly written in an effort to reach a reasonable settlement offer. As a condition of settlement, Gamlam insisted on payment of the principal with interest.

SPS also relies on Richter v. Trimberger, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988), to argue that because the offer to pay was unconditional, SPS is not liable for interest beyond the date it offered to pay. SPS's reliance on Richter is misplaced. In Richter, the "respondents deposited the amount due in the court registry without condition." Richter, 50 Wn. App. at 786. Unlike in Richter, there is no dispute that SPS did not deposit the amount owed into the court registry.

We conclude the trial court's findings support the decision to award Gamlam 12 percent interest on the amount owed from the date of the sale on August 25, 2006 until SPS actually paid the principal amount in October 2007.⁴

As an alternative argument, SPS asserts that the trial court did not have the authority to enter judgment in favor of Gamlam because Gamlam did not have standing under the bankruptcy code, 11 U.S.C. § 362(k).

We review issues of statutory interpretation de novo. Guillen v. Contreras, 147 Wn. App. 326, 330, 195 P.3d 90 (2008). When interpreting a statute, our purpose is to determine and enforce the legislative intent. Rental Housing Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 536, 199 P.3d 393 (2009). "We presume that

⁴ And because substantial evidence supports the trial court's finding that SPS willfully violated the bankruptcy stay, we also conclude that the trial court did not err in rejecting SPS's argument that the doctrine of impossibility applied.

Congress means what it says when it writes laws.” Miller v. AT & T Corp., 250 F.3d 820, 841 (4th Cir. 2001). If the statute’s meaning is plain on its face, we give effect to that plain meaning. Vaughn v. Epworth Villa, 537 F.3d 1147, 1152 (10th Cir. 2008), cert. denied, 129 S. Ct. 1538 (2009).

11 U.S.C. § 362(k)(1) provides in pertinent part,

[A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Under the plain language of the 11 U.S.C. § 362(k)(1), Gamlam is an individual who was injured by SPS’s willful violation of the stay and is therefore entitled to damages. If Congress had intended to limit the remedies under this section to “debtors” instead of “individuals,” it would have said so. See, e.g., Homer Nat. Bank v. Namie, 96 B.R. 652, 655 (W.D.La. 1989) (“If Congress intended to limit the remedies in § 362(h) to debtors it could have done so by the simple expedient of replacing the term ‘individual’ with ‘debtor.’”).

SPS’s reliance on In re Gruntz, 202 F.3d 1074, 1082 (9th Cir. 2000), and In re McGhan, 288 F.3d 1172, 1175 (9th Cir. 2002), to argue that only the bankruptcy court has jurisdiction to enforce the order requiring SPS to return the funds to Gamlam is misplaced. In In re Gruntz, the court held that federal courts are not bound by state court modifications of the automatic stay and “[a]ny state court modification of the automatic stay would constitute an unauthorized infringement upon the bankruptcy

court's jurisdiction to enforce the stay.” In re Gruntz, 202 F.3d at 1082. “In sum, by virtue of the power vested in them by Congress, the federal courts have the final authority to determine the scope and applicability of the automatic stay.” In re Gruntz, 202 F.3d at 1083.

Likewise, in In re McGhan, the court held that the state court did not have the authority to modify the bankruptcy court’s order discharging a claim and permanently enjoining a party from collecting on a debt. In re McGhan, 288 F.3d at 1175. However, the court specifically noted, “we do not hold that a state court is divested of all jurisdiction to construe or determine the applicability” of a bankruptcy court’s order. In re McGhan, 288 F.3d at 1180 (“It plainly was in the power of the state court to take judicial notice of McGhan’s proceedings.”).

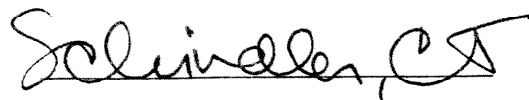
Unlike in In re Gruntz and In re McGhan, the trial court did not seek to modify the terms of the automatic stay or the bankruptcy court order. And under In re McGhan, the trial court had the authority to determine the applicability of the bankruptcy court order in the lawsuit against SPS for monies due and damages.

SPS also cites Tilley v. Vucurevich (In re Pecan Groves of Arizona), 951 F.2d 242 (9th Cir. 1991), to argue that Gamlam does not have standing because “section 362 is intended solely to benefit the debtor estate.” Tilley, 951 F.2d at 245. SPS’s reliance on Tilley is also misplaced. The court in Tilley held that only the trustee, not the creditors, have standing to attack violations of an automatic stay in bankruptcy court. Tilley, 951 F.2d at 245. Here, while we agree that Gamlam did not have

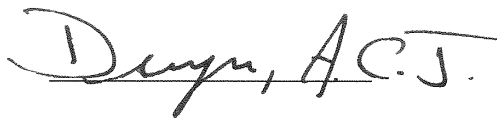
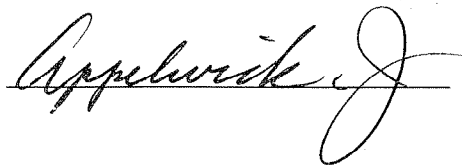
standing to attack SPS's violation of the automatic stay in state court, Gamlam had standing to sue SPS in state court to enforce the bankruptcy court order to refund the purchase price and for damages.

SPS also asserts that the trial court erred in awarding Gamlam attorney fees because there was no statutory or contractual basis for the fees. 11 U.S.C. § 362(k)(1) provides in pertinent part that: "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees" Because substantial evidence supports the trial court's finding that Gamlam was injured by SPS's willful violation of the bankruptcy stay, we conclude the trial court did not err in awarding Gamlam attorney fees under 11 U.S.C. § 362(k)(1). Upon compliance with RAP 18.1, under 11 U.S.C. § 362(k)(1), Gamlam is also entitled to reasonable attorney fees on appeal.

We affirm.

Handwritten signature of Schneider, C.J.

WE CONCUR:

Handwritten signature of Dwyer, A.C.J.Handwritten signature of Appelwick, J.